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IN THE

Supreme Court of the United States

October Term, 1962

No. 507

HIGH FIDELITY RECORDINGS, INC.,

Petitioner,

vs.

ADMO FIDELITY, INC.,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

To the Supreme Court of the United States:

I.
OPINIONS BELOW.

The petitioner has failed to provide the pertinent opinion of the Court of Appeals for the Ninth Circuit on the first appeal herein. This opinion setting forth the facts of the present litigation is reported at 283 F. 2d 551.

II.
ADDITIONAL STATUTES INVOLVED.

Federal Rules of Civil Procedure, 28 U. S. C. Rule 37(a):

"If a party or other deponent refuses to answer any question propounded upon oral examination, the

examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. . . . If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees."

California Civil Code Section 3294:

(See pertinent text in respondent's argument, *infra.*)

III.

COUNTER STATEMENT OF CASE.

The "Statement" in the petitioner's argument omits any summary of the nature and substance of the prior proceedings. The following short review will provide a more comprehensive understanding of the facts material to the consideration of the questions presented here.

Respondent, Audio Fidelity, Inc., and petitioner, High Fidelity Recordings, Inc., are corporations competitively engaged in the recording and distribution of phonograph records which are packaged and sold in record covers or jackets. In the present action, based solely on unfair

competition, it is established in the opinions of the District Court and the Court of Appeals that petitioner deliberately copied primary identification features of respondent's jacket which had acquired a secondary meaning, for the purpose of palming off its records as those of respondent. Petitioner sold a substantial number of its competing records in the accused jacket, with resulting customer confusion. In short, this case presents the typical situation involving deliberate efforts to palm off goods by simulation of the dress of a competitor's product.

No copyright in the respondent's jacket was ever pleaded nor was any copyright registration ever received in evidence during the trial of this case. Jurisdiction of the Federal Court was at all times based solely on diversity under 28 U. S. C. 1332(a).

In the first trial of this action, not mentioned in petitioner's statement, the District Court, although noting that there was direct copying of the dress of respondent's record jacket, concluded that because the features reproduced by petitioner were "functional" under the decision of *Pagliero v. Wallace China Co.*, 198 F. 2d 339 (C. A. 9th, 1952), they could not acquire a secondary meaning nor be protected against reproduction by a competitor.

On the first appeal, the Court of Appeals for the Ninth Circuit in *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc.*, 283 F. 2d 551 (1960), reversed the Trial Court and held that the functionality rule set

forth by the *Paglicro* case was inapplicable "where the 'form of dress for the goods (is) primarily adapted for purposes of identification and individuality . . .'" (283 F. 2d at p. 555). In addition, the Court of Appeals held that respondent had established by direct evidence or by presumption and inference therefrom that:

1. Petitioner had copied major identification features of respondent's jacket (p. 557);
2. There was such a similarity between the two jackets as to result in a likelihood of public confusion (pp. 557, 558);
3. The respondent's jacket had acquired a secondary meaning (pp. 557, 558);
4. The (petitioner's) jacket was copied from respondent's with the intent to deceive purchasers and to realize upon such secondary meaning (p. 558).

The Court of Appeals having noted that the proof of damages was insufficient (p. 558), remanded the case back to the Trial Court for further consideration of this question [R. 219].

Prior to the second trial or accounting of damages in the District Court, respondent sought to take the deposition of the petitioner's president, Richard Vaughn, to establish petitioner's profits on the sales of the record in the simulated jacket. Mr. Vaughn had successfully concealed petitioner's profits at the first

trial where he was characterized by the Trial Court as "one of the most unsatisfactory witnesses I have had for a long time" [R. 212]. At such depositions Vaughn failed to produce the books and records called for by the notice and the subpoena served on him and refused to answer many pertinent and material questions. Further, such sales figures as Vaughn did disclose were contradictory and misleading. When the matter was brought before the Trial Court for supervision, it found that Vaughn's refusal "was without substantial justification", and respondent's motion for costs and reasonable attorney's fees under Rule 37(a) of the Federal Rules of Civil Procedure was taken under submission [R. 220-222].

At subsequent depositions [Ex. 67, Vol. 2] and at the second trial on the issue of damages, Vaughn continued to secret the profits made by the sale of records in the accused jacket and successively changed his testimony as to the number of such records sold [Ex. 67, Vol. 1, p. 65, Vol. 2, pp. 107-108, and R. 293]. Thus, the Trial Court in its decision stated "that defendant maintained unsatisfactory, inadequate and ineffectual books; that the chief witness for the defendant corporation (Mr. Vaughn) was evasive and that he hindered discovery proceedings by his failure and refusal to cooperate . . ." [R. 236]. The Trial Court then awarded respondent the profits made by petitioner through the sale of records in the accused jacket in the sum of $6,164.98. In addition, the Trial

Court awarded respondent $2,500.00 exemplary damages [R. 236], for reasons stated as follows in Finding of Fact 20 [R. 253]:

> "20. Plaintiff is entitled to an award of exemplary damages in the amount of reasonable attorneys' fees of $2,500 in view of the fact that there was deliberate copying of the jacket; defendant maintained unsatisfactory, inadequate, and ineffectual books, even after March 15, 1959, the date of alleged changeover to the jacket of Exhibit A, and Mr. Vaughn repeatedly changed his testimony; and defendant hindered discovery proceedings by Mr. Vaughn's unreasonable failure to answer questions and refusal to cooperate in ascertaining the extent of defendant's profits on the sale of records in the accused jacket Exhibit 2."

Petitioner's appeal from this accounting was based on the argument that under California law, petitioner's profits from the sale of the record in the copied jacket could not be awarded respondent, absent proof that such sales on which the profits were determined resulted from established incidents of palming off. Petitioner also contested the award of exemplary damages.

The Court of Appeals rejected both of these arguments and affirmed the propriety of the modest judgment of the District Court. In this second decision, Appendix B to the Petition, the Court of Appeals reiterated its view of the case as one involving "deliberate intent to palm off" (App. B, p. 20).

IV.

QUESTIONS PRESENTED.

The Petition (pp. 2-3) presents four questions upon which a review is requested, should this writ be granted. It is submitted that there are really only two questions involved and that these were framed in utter disregard of the findings of fact and conclusions of law of the District Court and Court of Appeals. Accordingly, respondent herein has rephrased these questions which are sought to be raised by petitioner, as follows:

(1) Whether the Federal Court in the exercise of its diversity jurisdiction (28 U. S. C., Sec. 1332(a)-(1)) is precluded from granting relief under state law for unfair competition in the nature of "palming off", by virtue of the fact that the work which is simulated or copied has been copyrighted under the Federal Copyright Act.

(2) Whether the Federal Court exceeds its jurisdiction in awarding exemplary damages as measured by reasonable attorneys' fees where wilful unfair competition under state law is established as well as concealment of accounts and where the defendant hinders, obstructs or delays the processes of the Court.

V.

ARGUMENT COUNTERING ASSERTED REASONS FOR THE WRIT.

A.

The Cases and the Law Review Articles Relied Upon by Petitioner in Support of Its Argument That State Created Remedies for Unfair Competition Are Precluded by the Federal Copyright Act Are Wholly Inapplicable to the Factual Situation of This Case.

The petitioner asserts that the Copyright Act (17 U. S. C. §1, *et seq.*) precludes state created remedies for copying a published and copyrighted work. In support thereof petitioner relies upon Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 Harv. L. Rev. 409 (1956), Kalodner and Vance, *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 Harv. L. Rev. 1079, 1098-1099 (1959), and the principle which petitioner claims is implied but not decided in *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591 (1834), *Holmes v. Hurst*, 174 U. S. 82 (1899), and *Hurn v. Oursler*, 289 U. S. 238 (1933).

All of these sources deal with an entirely different factual context from the instant case. They are concerned solely with the conflict presented by the concept of common law literary property as enforced by the various states, as opposed to the federal remedy provided by the Copyright Act. They are not concerned with the problem of trading on a secondary meaning or "palming off" of competitive merchandise by label or dress simulation. These decisions deal solely with the remedies afforded an author or artist to protect

him from the mere copying of his work by another, outside of the environment of competitive dealing.

None of these sources dealing with literary property hold or even suggest that a federal copyright of the features of the dress of the goods or label precludes the state remedy for "palming off" which arises from the copying and sale of competing goods in the market place under the simulated label or dress.

The Second Circuit cases relied upon in petitioner's argument (p. 7) are equally inapplicable to the factual situation in the present case. The petitioner quotes a portion of the dissenting opinion of Judge Learned Hand in *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 667 (C. A. 2nd, 1955), as supporting the argument that the state remedy for unfair competition is not available to protect once published literary property. In order to clearly understand the scope of Judge Hand's dissent we must look to the majority opinion in *G. Ricordi & Co. v. Haendler*, 194 F. 2d 914 (C. A. 2nd, 1952) (cited at p. 7 of petitioner's argument), where Judge Hand also recognized a valid state remedy for unfair competition even when a copyrighted work was the subject of the action. He distinguished with tacit approval the case of *Fisher v. Star Co.*, 231 N. Y. 414, 132 N. E. 133, 19 A. L. R. 937, where the plagiarism involved went so far as to make the reader believe that the copy was the work of the original author, *i.e.*, a "palming off" type of situation. Thus, it is clear that Judge Hand's dissent in the *Capitol Records* case was only intended to relate to common law literary property and not to unfair competition involving palming off.

The present case is not in conflict with the Second Circuit holdings in *G. Ricordi & Co. v. Haendler, supra,* and *National Comics Publications v. Fawcett Publications,* 191 F. 2d 594 (C. A. 2nd, 1951). As stated above, Judge Hand's opinion in *G. Ricordi & Co.* is fully consistent with the present case in recognizing the existence of a cause of action for unfair competition against a plagiarist of a copyrighted work who palms off his copies as those of the original author. Similarly, the Second Circuit in the *National Comics Publications* case recognized the valid state remedy of unfair competition in a case involving a copyrighted work, but merely disposed of the action on the ground that likelihood of public confusion was not shown.

Thus, it appears from an analysis of petitioner's own cases that the federal courts, exercising diversity jurisdiction have the power to enforce a remedy of unfair competition for the copying and palming off of a copyrighted work, such as a label or dress of goods, which has acquired a secondary meaning.

The distinction between the situation involving the mere copying of copyrighted literary property and that of the present case, embracing the appropriation of copyrighted display material which has acquired a secondary meaning, for the purpose of palming off goods in the market place, is further emphasized in the Second Circuit decision of *Swanson Mfg. Co. v. Feinberg-Henry Mfg. Co.,* 147 F. 2d 500 (C. A. 2nd, 1945). That case involved unfair competition in the sale of coin purses promoted by copyrighted display cards which were simulated by defendant. The opinion meets pe-

titioner's argument herein headon and disposes of it at page 503, where it states:

> "It has argued earnestly that the corporate plaintiff cannot maintain its action for unfair competition since it has a registered copyright on the card and that since it elected to obtain the copyright its only remedy must be an action for infringement. In support of that contention it relies on cases like Fashion Originators Guild v. Federal Trade Commission, 2 Cir., 114 F. 2d 80, holding that an author loses on publication the common law rights in his literary property and has only such rights to exclusive republication as he may obtain by virtue of a registered copyright. Such interpretations of copyright law are not applicable to the issue in this case in the way this defendant seeks to make them. We may assume, arguendo, for present purposes that the registered copyright has been infringed. Even so *the owner could waive that tort and sue to recover for unfair competition which it could prove the defendant had practiced in palming off its goods for those of the plaintiff by means of the copyrighted material.* The commission of two torts at the same time did not make the defendant immune from suit upon either, or both for that matter, at the election of the party wronged." (Emphasis added.)

To the same effect, see *Lone Ranger, Inc. v. Cox*, 124 F. 2d 650 (C. A. 4th, 1942).

B.

The Decision of the Court of Appeals is Not Contrary to the California State Law as Set Forth in Lowes, Inc. v. Superior Court, 18 Cal. 2d 419, 15 P. 2d 983 (1941).

The same distinction mentioned with respect to the federal court decisions is applicable to the *Lowes* case relied upon in petitioner's argument (p. 8). This decision relates to the election made by an author when he chooses to seek statutory copyright and forsake his common law right of literary property. It limits in no way the right of a copyright owner to pursue a state-created remedy of unfair competition when the dress of his goods has acquired a secondary meaning and has been deliberately copied by a competitor for the purpose of palming off. This is the precise basis upon which the court below granted the respondent herein recovery under the decision of *Modesto Creamery Co. v. Stanislaus Creamery Co.*, 168 Cal. 289, 142 Pac. 845 (1914).

C.

The Court Below Did Not Exceed Its Diversity Jurisdiction in Awarding Respondent Attorneys' Fees as Such, or Exemplary Damages as Measured by Reasonable Attorneys' Fees.

The Trial Court awarded respondent $2,500 attorneys' fees or as stated in Finding of Fact No. 20 [R. 253], "exemplary damages in the amount of reasonable attorneys' fees," because of respondent's deliberate piracy and in view of the conduct of Mr. Vaughn, its president, in obstructing the proceedings [R. 236]. Whether regarded as simply attorneys' fees, or as exemplary damages measured by reasonable attorneys' fees this award was clearly within the jurisdiction of the federal court.

1. The Award Was Justified Under Rule 37(a) of the Federal Rules of Civil Procedure.

As pointed out above, Mr. Vaughn, prior to the second trial on the damages issue, failed to produce books and records called for by a notice of taking depositions and a subpoena duly served on him, and also refused to answer many pertinent questions from which a determination of petitioner's profits might be ascertained. The Trial Court, on motion of respondent under Rule 37(a) of the Federal Rules of Civil Procedure, found Vaughn's refusal to answer to be "without substantial justification" and took under submission the motion for costs and attorneys' fees [R. 220-222].

Subsequently, and after repeated unwarranted and evasionary tactics during the second trial, the District Court stated in its decision that in addition to petitioner's fraudulent copying of respondent's record jack-

et "defendant maintained unsatisfactory, inadequate and ineffectual books; that the chief witness for the defendant corporation (Mr. Vaughn) was evasive and that he hindered discovery proceedings by his failure to cooperate . . ." [R. 236]. In view of the above facts the District Court awarded respondent exemplary damages in the amount of reasonable attorneys' fees of $2,500.

Apart from any other basis, this modest award of attorneys' fees after such findings by the Trial Court was authorized and, indeed, prescribed under Rule 37(a).

2. Attorney's Fees May Properly Be Awarded by the Federal Court in Cases of Wilful Unfair Competition, Apart From Statutory Authorization.

In *National Van Lines v. Dean*, 237 F. 2d 688 (C. A. 9th, 1956), the Court of Appeals held, in sustaining an unfair competition count under California law, that an award of attorneys' fees to plaintiff was proper. The Court stated at page 694:

> "Since we have found appellee's acts to have been wilful and calculated to trade upon appellant's good will, the latter is entitled to recover its actual and reasonable attorneys' fees incurred in this litigation.[8]"
>
> "8. Aladdin Mfg. Co. v. Mantle Lamp Co., 7 Cir., 116 F. 2d 708; Admiral Corp. v. Pendo, 2 Cir., 203 F. 2d 517; Keller Products, Inc. v. Rubber Linings Corp., 7 Cir., 213 F. 2d 382, 47 A. L. R. 2d 1108."

The decision of the Court of Appeals respecting attorneys' fees in the present case and in *National Van Lines v. Dean, supra,* is in line with the decision of this Court in *Sprague v. Ticonic National Bank,* 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). Here the discretionary power of federal courts in equity suits to award attorneys' fees is fully explored. Relying upon both English and American precedent, the court stated at 307 U. S. 164:

> "Allowances of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts."

"Appropriate situations" is expressedly not limited by this Court to those cases where the plaintiff purported to sue for a class having a common interest or has recovered a fund in which others share. Through interpretation by the various Courts of Appeals, "appropriate situations" include cases of fraud or oppression, such as wilful palming off.

In *Specialty Equipment & Machinery Corp. v. Zell Motor Car. Co.,* 193 F. 2d 515 at pages 520, 521 (4 Cir., 1952), the Court said:

> ". . . costs beyond those allowed by statute will be taxed only in exceptional circumstances, 'such as exist in the case of fraud, oppression, or bad faith, cases of fiduciary relationship or those in which the prevailing party has helped to create the fund upon which the costs are charged' (citing *Sprague v. Ticonic Nat. Bank, supra*)."

More recently in *Local No. 159 I.U.U.A.A. & A.I.W. v. American Brake Shoe Co.*, 298 F. 2d 212 (4 Cir. 1962), cert. den. 369 U. S. 873, 8 L. Ed. 2d 276, 82 S. Ct. 1142, the Court stated that in a proper situation where fraud, oppression, or bad faith is shown the recovery of attorneys' fees is proper. More particularly referring to unfair competition actions, the decision continues at page 215:

> "In actions for unfair competition attorneys' fees are assessed as an element of damages where the wrongdoers' action is unconscionable, fraudulent, willful, in bad faith, vexatious or exception."

The inherent power of the federal courts to award attorneys' fees as part of costs without regard to state law is also pointed out in *Bank of China v. Wells Fargo Bank and Union Trust Co.*, 209 F. 2d 467 (C. A. 9th, 1953), a diversity case governed by substantive California law, where the Court stated at page 476:

> "The Rules of Decision Act 28 USC §1652 and Erie R. Co. v. Tompkins, 304 US 64, 58 S. Ct. 817, 82 L. Ed 1181, did not have the effect of making the state law on attorneys' fees determinative."

3. Exemplary Damages Under California Statute in the Amount of Reasonable Attorneys' Fees May Be Properly Awarded by a Federal Court Having Diversity Jurisdiction With Venue in California.

The California Civil Code Section 3294 provides:

> "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Pursuant to this statute exemplary damages may be awarded in unfair competition cases where defendant has been guilty of fraud. Under both California and Federal law, direct copying of features of identification, with intent to deceive, constitutes a fraud within the terms of said Civil Code, Section 3294.

Singer Mfg. Co. v. Redlich, 109 Fed. Supp. 623 (D.C.S.D. Cal. 1952);

Sandler v. Gordon, 94 Cal. App. 2d 254, 210 P. 2d 314 (1949);

Sterling Drug v. Benatar, 99 Cal. App. 2d 393 (1950).

In view of the foregoing statute and its application, it would seem irrelevant that the state court may not in a guardianship case, for example, *Hornaday v. Hornaday* (1949), 95 Cal. App. 2d 384, 213 P. 2d 91 (Petition p. 9), award attorneys' fees. In any event, petitioner's argument is inapplicable to the present case, involving not only fraud but the purposeful concealment of accounts. The state law does not control procedural matters. Here the federal court's processes have been delayed and obstructed by petitioner's con-

duct resulting in added and unnecessary costs to respondent. It is therefore proper for a federal court without regard to state practice, either to award straight attorneys' fees for the wilful conduct of the petitioner or exemplary damages under state law, measured by reasonable attorneys' fees.

VI.
CONCLUSION.

It is submitted that this case does not display any sufficient reason for the grant of a writ of certiorari within the rulings and practice of this Court. There is no conflict shown between the decisions of the Ninth and Second Circuits. Further, there is no important question raised respecting the relationship between federal and state remedies for the enforcement of the exclusive rights provided under the Federal Copyright Act.

This is a simple unfair competition action involving the copying of dress of goods which had acquired a secondary meaning, and the selling of competing goods in the simulated dress with the deliberate intent by petitioner of deceiving purchasers. That this dress of goods was also copyrighted, creates no important legal issue.

The public interest has been served through the upholding by the Court of Appeals of the decision of the District Court.

It is suggested that the petition should be denied.

Respectfully submitted,

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Attorney for Respondent,